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Supreme Court, U.S.
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No. 04-1340

IN THE

Supreme Court of the United States

CATERPILLAR INC.,
Petitioner,

v.

STURMAN INDUSTRIES, INC., ODED E. STURMAN, AND CAROL K. STURMAN
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition explains the clear conflict that exists—and that circuit judges have perceived and discussed—on frequently recurring questions of exceptional practical and jurisprudential importance. Respondents counter with a recitation of anti-certiorari platitudes that have no bearing on this case. By aiming verbal pyrotechnics at strawmen, respondents fail to enshroud the compelling reasons for this Court to resolve a question on which "the federal courts of appeal [are] split." *Dyer* v. *Calderon*, 151 F.3d 970, 995 (9th Cir. 1998) (O'Scannlain, J., dissenting).

When the smoke clears from respondents' rhetoric, several dispositive truths remain. For all respondents' talk about "ancient common-law roots" (Br. in Opp. 4), they cite no prior case that vacated a judgment because the spouse of an employee of a party sat on the jury. For all respondents' talk about "stretching back to Blackstone's day" (*id.* at 8), the only holding of this Court they cite (*id.* at 4, 8) applying the implied bias doctrine (*Crawford* v. *United States*, 212 U.S. 183 (1909), was later repudiated on precisely that point. *United States* v. *Wood*, 299 U.S. 123, 138-41 (1936); *see* Pet. 9, 15 n.7. For all respondents' talk about a constitutional "right" not to have the spouse of a party's employee sit on a jury (Br. in Opp. 1), they point to no constitutional text, no decision of this Court or any court (other than the Federal Circuit in this case) that created or endorsed such a "right."

I. CERTIORARI IS NECESSARY TO RESOLVE THE SPLIT OVER THE IMPLIED BIAS DOCTRINE

Respondents reiterate the flatly incorrect foundation for the Federal Circuit's decision: a Seventh Amendment right to exclude spouses of a party's employees from jury service. Br. in Opp. 1. Of course, these words cannot be found in the Constitution. And if such a right existed, then *all* courts—federal and state—would be bound to forbid

spouses of employees from serving on juries when the employer is a party. But that is not so. Numerous states reject respondents' purported constitutional right, and other federal circuits reject the implied bias argument accepted by the Federal Circuit here. *See* Pet. 11-17 & nn.3-9.

A. Respondents Mischaracterize this Court's Precedents on the Implied Bias Doctrine

There is no merit to respondents' suggestion (Br. in Opp. 4-5) that this Court endorses the implied bias doctrine. Courts of appeals have repeatedly articulated their understanding that this Court has not accepted the doctrine: "The Supreme Court has never explicitly adopted or rejected the doctrine of implied bias." *Tinsley* v. *Borg*, 895 F.2d 520, 527 (9th Cir. 1990); *see also Fitzgerald* v. *Greene*, 150 F.3d 357, 365 (4th Cir. 1998) (same); *Andrews* v. *Collins*, 21 F.3d 612, 620 (5th Cir. 1994) (same).

Among this Court's rulings, respondents' rely solely on *Crawford*, which held that federal employees were disqualified from serving on juries in federal government cases. *See* 212 U.S. at 194-96. But, this Court rejected *Crawford* in *Wood*. *See* Pet. 15 n.7; *cf. Baker* v. *Hudspeth*, 129 F.2d 779, 783 (10th Cir. 1942) (*Wood* overruled *Crawford*). Since *Wood*, this Court has "not looked favorably upon attempts to impute bias to jurors." *Andrews*, 21 F.3d at 620 (citing cases); *see also* Pet. 8-9 (same).

Contrary to respondents' effort to limit *Smith* v. *Phillips*, 455 U.S. 209 (1982) to its facts (Br. in Opp. 4), numerous courts hold that *Smith* rejected the implied bias doctrine entirely. *See* Pet. 11-12 & nn. 3-4. Although respondents try to elevate one Justice's concurrence to a holding endorsing the doctrine (Br. in Opp. 4-5), the Court's opinion in *Smith* was joined by five other Justices, who

constitute a majority. 455 U.S. at 210 (Rehnquist, J., joined by Burger, C.J., White, Blackmun, and Powell, J.J.).[1]

Other courts recognize that *Smith* dealt a serious blow to the implied bias doctrine. *See* Pet. 11-12 (citing cases). Just weeks after the petition in this case was filed, the Fourth Circuit reiterated its doubts regarding the doctrine. *See Conner* v. *Polk*, -- F.3d --, 2005 WL 1020953, at *7 n.4 (4th Cir. May 3, 2005) ("[t]here may be some question as to whether implied bias remains a viable doctrine following the Supreme Court's majority opinion in *Smith*"). Such continued uncertainty warrants certiorari, as these pervasive doubts will not be dispelled without this Court's direction.

B. The Circuits are Split

Respondents' argument (Br. in Opp. 5-6) that no circuit split exists over the implied bias doctrine is untenable.

Eighth Circuit. Respondents' dismissive minimizing of the Eighth Circuit's consistent holdings as mere "broad language" (*id.* at 5), would come as shocking news to both the circuit and district judges in the Eighth Circuit who repeatedly reject the implied bias doctrine.[2]

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[1] Concurring opinions cannot "take precedence over an opinion joined in its entirety by five Members of the Court." *County of Allegheny* v. *ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J. concurring in the judgment in part and dissenting in part).

[2] *See* Pet. 11 (citing cases); *Goeders* v. *Hundley*, 59 F.3d 73, 75-76 (8th Cir. 1995) (challenged juror had been married to the murder victim's niece; "In *Phillips*, the Supreme Court . . . rejected implied bias in cases of alleged juror bias"); *Irons v. Lockhart*, 741 F.2d 207, 208 (8th Cir. 1984) (under *Phillips*, "a court cannot impute [jury] bias based on the petitioner's bare allegations"); *United States* v. *Kelton*, 518 F.2d 531, 533 (8th Cir. 1975) (per curiam) (district court "correctly stated that this circuit has rejected

In response to these clear Eighth Circuit holdings, respondents offer (Br. in Opp. 5-6) a few stray cases—none of which upheld a claim of juror bias. Those cases simply recite dicta from other circuits that accept limited versions of the implied bias doctrine. *See United States* v. *Tucker*, 243 F.3d 499, 509 (8th Cir. 2001) (citing *United States* v. *Greer*, 223 F.3d 41, 53 (2d Cir. 2000)); *Fuller* v. *Bowersox*, 202 F.3d 1053, 1057 (8th Cir. 2000) (citing *Burton* v. *Johnson*, 948 F.2d 1150, 1158 n.10 (10th Cir. 1991)). In rejecting the bias challenges, neither *Tucker*, *Fuller*, nor *United States* v. *Parmley*, 108 F.3d 922 (8th Cir. 1997) held that the implied bias doctrine was viable, or that the Eighth Circuit's earlier

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'the *per se* theory of implied bias' in favor of a requirement that actual prejudice be demonstrated"); *United States* v. *Jones*, 486 F.2d 476, 477 (8th Cir. 1973) ("We have heretofore rejected the *per se* theory of implied bias advanced by [challenging party]"); *United States* v. *Williams*, 484 F.2d 176, 178 (8th Cir. 1973) ("At the most the challenge must rest entirely on a *per se* theory of implied bias. This Court reject[s challenger's] argument"); *accord Dyas* v. *Lockhart*, 705 F.2d 993, 997 (8th Cir. 1983) (no bias where trial judge was related to prosecuting attorneys); *Walters* v. *Maschner*, 151 F. Supp.2d 1068, 1090 (N.D. Iowa 2001) ("In *Phillips*, the Supreme Court . . . rejected implied bias in cases of alleged juror bias"); *United States* v. *Tucker*, 36 F. Supp.2d 1110, 1116 (E.D. Ark. 1999) ("The Court cannot imply or presume a juror's bias"), *aff'd*, 243 F.3d 499 (8th Cir. 2001); *United States ex rel. Means* v. *Solem*, 457 F. Supp. 1256, 1265 (D.S.D. 1978) ("The Eighth Circuit . . . stated 'this circuit has rejected the *per se* theory of implied bias in favor of a requirement that actual prejudice be demonstrated'") (quotation omitted); *Jamestown Farmers Elevator, Inc.*, v. *General Mills, Inc.*, 413 F. Supp. 764, 775 (D. N.D. 1976) ("The Eighth Circuit has recently rejected 'the *per se* theory of implied bias in favor of a requirement that actual prejudice be demonstrated'") (quotation omitted), *aff'd in part, rev'd in part on other grounds*, 552 F.2d 1285 (8th Cir. 1977).

precedents were questioned.[3]

Ninth Circuit. While recognizing the implied bias doctrine in some circumstances, the Ninth Circuit has held—consistent with this Court's precedents—that the doctrine is inapplicable to employees of a party. *See Nathan* v. *Boeing Co.*, 116 F.3d 422, 425 (9th Cir. 1997). If employees of parties are not *per se* excluded from serving on juries, then relatives of employees surely are not. Accordingly, had the instant case arisen in the Ninth Circuit, the jury's verdict would plainly have been upheld under *Nathan.*

Respondents cannot distinguish *Nathan.* Rather, they suggest that *Nathan* is no longer good law in light of *Dyer* v. *Calderon,* 151 F.3d 970 (9th Cir. 1998) (en banc), because the writing judge in *Nathan* also wrote the panel opinion in *Dyer.* Br. in Opp. 8 n.2. *Dyer* involved a juror who lied during voir dire about having relatives victimized by violent crime. 151 F.3d at 972-73. *Dyer* does not mention employment-based bias, and makes no mention of *Nathan,* much less criticize or overrule it.[4]

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[3] Respondents take entirely out of context the citation to *Parmley* in Caterpillar's rehearing petition in the Federal Circuit. Br. in Opp. 6. The citation addressed the Federal Circuit's inaccurate discussion of *Zamora* v. *Guam,* 394 F.2d 815 (9th Cir. 1968). Since the Federal Circuit incorrectly distinguished *Zamora* as involving allegations of "actual" bias rather than "implied" bias (*see* Pet. 22a-23a), Caterpillar's rehearing petition cited several cases—including *Parmley*—that correctly characterized the bias alleged in *Zamora* as "implied" rather than "actual." *See* Pet. for Reh'g at 13 n.10. Caterpillar never asserted that *Parmley* recognized the *viability* of the implied bias doctrine, as the Eighth Circuit has consistently rejected the doctrine (and rejected the bias challenge in *Parmley* as well).

[4] *See Kohler v. Nationwide Mut. Ins. Co.*, 1998 U.S. App. LEXIS 13619, at *2 (9th Cir. June 22, 1998) (following *Nathan* in

Other circuits. Additional circuits reject *per se* rules disqualifying jurors because of family relationships. Pet. 15-16 (citing cases from the Second, Fourth, Sixth, Seventh, and D.C. Circuits); *see also Orme* v. *Pratt,* 18 F. Cas. 820 (C.C.D.C. 1830) (Cranch, C.J.) (denying motion for new trial when a juror was the plaintiff's brother-in-law). The only case respondents cite (Br. in Opp. 6) involving family relationships was an Eleventh Circuit case holding that the juror in question (the cousin of a witness) could properly serve on the jury. *See United States* v. *Rhodes,* 177 F.3d 963, 965-66 (11th Cir. 1999).

Despite respondent's contrary view (Br. in Opp. 8), Caterpillar *did* cite a "case holding that the spouse of an employee should be treated differently from an employee for purposes of implied bias." *See* Pet. 13 n.5 (citing *Jackson* v. *Board of Mayor & Aldermen,* 111 So. 828 (Miss. 1927)). *Jackson* stated that the passages from Blackstone cited by respondents are inapplicable when the juror is a relative of an employee of a party/corporation. 111 So. at 828. This, coupled with the cases holding relatives of parties and employees of parties are not *per se* excluded (Pet. 13-17 & nn. 5-9), fully refutes respondents' point.

The only case respondents cite for their contention that spouses of a party's employees are automatically excluded is *Getter* v. *Wal-Mart Stores, Inc.,* 66 F.3d 1119, 1122 (10th Cir. 1995). But, the spouse in *Getter* was also a stockholder of the company. *See id.*; *contra Jamestown Farmers,* 413 F. Supp. at 775 (employees/stockholders are not per se disqualified). Here, there is no indication that Juror No. 3 was a Caterpillar stockholder.

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rejecting implied bias challenge); *Bainlardi* v. *SBC Warburg,* 1998 U.S. Dist. LEXIS 19512, at *10 (S.D.N.Y. Dec. 11, 1998) (same).

The Federal Circuit's holding that one's status as a spouse of a party's employee establishes a *per se* constitutional disqualification from jury service is ill-considered, inconsistent with other courts of appeals, and should be reviewed by this Court.

II. THE FEDERAL CIRCUIT'S EXPANSION OF *MARTINEZ-SALAZAR* REWARDS UNFAIR GAMESMANSHIP

Contrary to respondents' contention, this petition does not ask the Court to reconsider the holding in *United States* v. *Martinez-Salazar*, 528 U.S. 304 (2000). Rather, it seeks review of the Federal Circuit's unwarranted expansion of that case to reward a contrived claim of juror bias. The decision below expands *Martinez-Salazar* (which was decided under Fed. R. Crim. P. 24) by applying it in a civil case. *Cf. Cruz* v. *Jordan*, 357 F.3d 269, 271 (2d Cir. 2004) (doubting whether *Martinez-Salazar* is applicable to civil cases); *Ramstad* v. *Lear Seigler Diversified Holdings Corp.*, 836 F. Supp. 1511, 1515 (D. Minn. 1993) (civil case; party waived challenge to allegedly biased juror when party did not exercise peremptory challenges against juror).

Moreover, as Justice Scalia (joined by Justice Kennedy) stated, this Court was not confronted in *Martinez-Salazar* with a litigant who had the opportunity to strike an allegedly biased juror, but did not do so. *See* 528 U.S. at 318 (Scalia, J., concurring in the judgment) ("Since he *did* expend the [peremptory] challenge, that issue is simply not before us"). Justice Scalia strongly indicated that when a party forgoes the opportunity to strike a challenged juror, it is "far from certain" that *Martinez-Salazar* suggests the correct result. *See id.* at 318-19.

The wholly pretextual nature of respondents' implied bias claim exemplifies precisely the gamesmanship about which Justice Scalia cautioned. In addition to the post-

Martinez-Salazar cases cited in the petition (at 22-23), additional courts had previously recognized the clear potential for abuse, and rejected the tactics respondents employed below.[5]

Subsequent to the filing of the petition, the Seventh Circuit rejected precisely the *Martinez-Salazar*-type argument respondents offer here to justify their tactical decision not to peremptorily challenge a juror whose mere presence—respondents later claimed—tainted the verdict with constitutional infirmity. In *Anderson* v. *Griffin*, 397 F.3d 515, 517-18 (7th Cir. 2005) (Posner, J.) the plaintiff (an African-American) argued that two potential jurors with short hair could be "skinheads" who might be biased against him. *Id.* After the judge refused to ask the potential jurors if they were racists, plaintiff peremptorily struck one of the potential jurors, but passed on the other. *Id.*

The Seventh Circuit rejected plaintiff's argument that the judge erred. *Id.* The court noted that plaintiff still had a peremptory challenge remaining, yet allowed the second

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[5] *See, e.g., Ramstad*, 836 F. Supp. at 1515 ("Plaintiffs elected not to use their third peremptory challenge to strike Mr. Horst. . . . [T]hey cannot object to Mr. Horst sitting on the jury"); *Catando* v. *Sheraton Poste Inn*, 592 A.2d 294, 300 (N.J. App. 1991) ("if a challenge for cause is erroneously denied but the party does not use an available peremptory challenge to excuse the juror, the error is harmless"); *Lundstrom* v. *Brekke Enters.*, 765 P.2d 667, 674 (Idaho 1988) (party could have kept allegedly biased juror off panel by exercising peremptory challenge); *Commonwealth* v. *Rundle*, 192 A.2d 362, 364 (Pa. 1963) (defendant had only exercised two of twenty peremptory challenges when he passed over challenged juror); *Rich* v. *Campbell*, 2 P.2d 886, 887 (Wash. 1931) (party failed to strike allegedly biased juror); *Scragg* v. *Sallee*, 140 P. 706, 708 (Cal. App. 1914) (same); *Kelly* v. *Chicago, R. I. & P. R. Co.*, 175 Ill. App. 196, 213 (1912) (same).

juror to be seated. *Id.* at 518. As to plaintiff's argument that he had to use the remaining peremptories against potentially unfriendly jurors, the Seventh Circuit held that it would not extricate plaintiff from a "pickle" of his own making. *See id.* at 519. Respondents here make just the argument rejected by the Seventh Circuit. *See* Br. in Opp 3 (although three peremptories remained, respondents did not strike Juror No. 3 "because they wanted to ensure that certain other prospective jurors were not seated").

In short, the decision below rewards gamesmanship that other circuits rightfully condemn. It fully warrants this Court's review and reversal. Respondents' remaining reasons for opposing certiorari merit only brief response.

1. Respondents incorrectly suggest (Br. in Opp. 7) that certiorari is inappropriate because the Federal Circuit's published opinion is "not binding" on any court (supposedly because regional circuit law applied). Wholly aside from the incorrect, preposterous—and pernicious—notion of a non-binding published opinion, this Court has made clear that an opinion's "lack of precedential effect" "carries no weight in our decision to review the case." *C.I.R.* v. *McCoy,* 484 U.S. 3, 7 (1987). This Court has granted certiorari on numerous occasions to resolve circuit splits even when the underlying decision is unpublished. *See, e.g., E. Associated Coal Corp.* v. *U.M.W., Dist. 17,* 531 U.S. 57 (2000); *Old Chief* v. *United States,* 519 U.S. 172 (1997).

2. Despite respondents' denial that they acquiesced in Juror No. 3's service (Br. in Opp. 8 n.1), both the district court and the courts of appeals correctly so found.[6]

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[6] *See* Pet. 6. The district court held "the Sturmans were aware of Juror No. 3's marriage to a Caterpillar employee, yet declined to individually challenge her for cause when offered the opportunity by the Court to do so." Pet. App. 47a. The court of appeals added: "Sturman specifically stated it would not individually challenge

3. There is no merit to respondents' diversionary argument of waiver. Br. in Opp. 7, 12. The issues of implied bias and waiver of the challenge to Juror No. 3 were presented to and decided by the district court and the Federal Circuit. *See* 14a-27a, 46a-47a, 180a-181a. Even if respondents were correct that Caterpillar is making "new arguments," this Court has made clear that there is no waiver in such circumstances. *See, e.g., Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("traditional rule" of Court is that so long as issue or claim is preserved, petitioner can make any arguments supporting its position).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Juror No. 3, despite having additional reasons for doing so." *Id.* at 21a. There is no dispute that respondents possessed three peremptory challenges when they passed on Juror No. 3. Pet. 5.